IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.508 OF 2006

Nandlal S. Yadav ...Appellant
Vs.
Kailash Yadav & others ...Respondents

Mr.O.R.Tiwari for the Appellant
Mr.M.R.Yadav for the Respondent Nos.1 and 2.
Ms S.V.Devgande for Respondent No.3

CORAM: A.S.OKA, J.
DATED: APRIL 17,2006.

P.C.:

1. Admit. Advocate for the Respondent Nos.1 and 2 waives service. The Advocate for the Respondent No.3 waives service. Taken up for hearing forthwith.

2. The Appeal is by the original Plaintiff. By the impugned Judgment and Decree the suit has been dismissed for default on the ground that the Plaintiff was absent and even his witnesses were absent on 16th February 2006 when the suit was fixed for recording of evidence.

3. The learned Advocate for the Appellant-Plaintiff submitted that the Affidavit of evidence of Plaintiff is ready and it could not be filed as on the relevant date the Plaintiff was not present in the Court. He states that the Plaintiff desires to examine one or two witnesses.

4. The learned Advocate for the Respondent Nos.1 and 2 submitted that on earlier occasion also the suit was dismissed for default. He pointed out that the suit was

dismissed after the learned Judge gave two opportunities to the Plaintiff. He submitted that even if this Court is inclined to set aside the impugned Judgement and Order and to remand the suit, the Appellant be directed to compensate the Respondents by ordering payment of costs. The learned Advocate for the Respondent No.3 has no objection for remanding the suit to the Trial court.

5. I have considered the submissions. Perusal of the impugned order shows that the Appellant was not present in the court when the suit was dismissed. The Advocate for the Appellant stated that the Affidavit of examination-in-chief is ready and it will be filed immediately. As the suit was dismissed for default, one chance deserves to be granted to the Appellant to prove his case. The Respondents can be compensated by ordering payment of costs.

6. Hence, I pass the following order :

i) Impugned Judgment and Order dated 16th February 2006 is quashed and set aside. S.C.Suit No.1782 of 1989 is restored to file subject to the condition that the Appellant will pay costs of Rs.3500/- to the Respondent Nos.1 and 2 within a period of four weeks from today.

ii) The Appellant will also pay a sum of Rs.3500/- by way of costs within a period of four weeks from today to the

respondent No.3. Deposit of the said amounts in the Trial Court will be treated as sufficient compliance with the order.

iii) If the amount of costs is neither paid nor deposited within stipulated period, the impugned order will stand.

iv) If the amount of costs is paid within stipulated period, parties are directed to appear before the learned trial Judge on 12th June 2006. On that date, the Appellant-Plaintiff will file his Affidavit of examination-in-chief and Affidavits of other witnesses proposed to be examined by the Appellant. It is made clear that no further time will be granted to the Appellant to file Affidavits. It is also made clear that the Appellant will make himself available on the very day for cross examination by the Advocate for the Defendants.

v) The learned Judge will decide the suit as expeditiously as possible and preferably on or before the end of December 2006.

vi) All questions on merits of the suit are kept open.

vii) Interim order, if any, which was operating during the pendency of the suit will continue to operate till disposal of the suit.

. Parties and the concerned court to act upon an authenticated copy of this order.

Judge.